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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 136

GETTIG EQUIPMENT CORP. and
GINDY MANUFACTURING CORP.,

Appellants,

vs.

BOARD OF ZONING APPEALS,
CITY OF CLEVELAND,
NATHAN H. SINGER, COMMISSIONER,

Appellees.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

OPINIONS.

This matter arose out of the refusal of the Building Commissioner of the City of Cleveland to grant the appellants a use permit requested by them, for the subject premises. On June 6, 1966 the Board of Zoning Appeals of the City of Cleveland voted to uphold the Commissioner, in part, and to reverse the Commissioner in part. This ruling can be found in the Appendix, page 23.

This ruling was appealed pursuant to Section 2506 of the Ohio Revised Code to the Court of Common Pleas, the Court of Appeals, and the Supreme Court of the State of Ohio. The Ruling of the Court of Common Pleas and its Memorandum Opinion can be found in the Appendix, at page 23. The Journal Entry of the Court of Appeals can be found in the Appendix, at page 29. The ruling of the Supreme Court of the State of Ohio made on Feb-

ruary 26, 1969 dismissing the Appeal can be found in the Appendix, at page 29.

There were no opinions in regard to the issues raised herein in the Appellate Courts.

JURISDICTION.

Nature of the Proceedings.

As indicated above, this matter arose from an appeal from an Order of the Building Commissioner of the City of Cleveland refusing a request by the appellants to use their property in a manner in which the Commissioner claimed violated the zoning Laws of the City of Cleveland. This appeal is taken pursuant to 28 U.S.C. 1257 (2).

Dates of Decrees.

The appeal is taken from an order of the Supreme Court of the State of Ohio in Case No. 68-683, dated February 26, 1969 wherein said Court dismissed the appellants' appeal from the Court of Appeals of the State of Ohio, Eighth Judicial District. The Notice of Appeal was filed on April 3, 1969 in both the Supreme Court of the State of Ohio and in the Court of Appeals, Eighth Judicial District.

Claimed Jurisdiction of the United States Supreme Court.

Appellants believe that their constitutional rights have been violated, namely the Fourteenth Amendment, Section 1, and the Fifth Amendment.

Cases Believed to Sustain Jurisdiction.

The following cases sustained appellants' position that this court has jurisdiction to hear and determine this matter:

Adams v. Board of Zoning Adjustment, 241 S.W. 2d 35;
Akron, City of, v. Chapman, 160 O.S. 382;
Akron v. Klein, 171 O.S. 207;
Anderson v. Chester, 206 Iowa 452, 221 N.W. 354;
Appeal of Haller Baking Co., 295 Penn. 257, 145 A. 77;
Arkam Machine & Tool Co. v. Township of Lyndhurst, 73 N.J. Super. 528 (Sup. Ct. of N.J., App. Div. 1962);
Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E. 2d 587;
Bacon v. Walker, 204 U.S. 211, 27 Sup. Ct. 289;
Bassey v. City of Huntington Woods, 344 Mich. 701, 74 N.W. 2d 897;
Beachland Glass Co., et al., v. Woodmansee, et al., 11 O. Misc. 262;
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Bjork v. Safford, 333 Ill. 355, 169 N.E. 699;
Board of Adjustment of City of Des Moines, 42 N.W. 2d 299;
Board of Adjustment of Oklahoma City v. Shambour (Sup. Ct. of Okla. 1967), 435 P. 2d 569;
Boardman v. Davis, 231 Iowa 1227, 3 N.W. 2d 608;
Broad-Miami v. Board of Zoning Adjustment, 89 O.L.A. 140;
Brockman v. Moor, 112 O.A. 445;
Burgess v. Greenfield, 90 O.L.A. 500;
Chicago Title & Trust Co. v. Village of Franklin, 4 Ill. 2d 304;
Cincinnati v. Covington & C. Bridge Co., 1900, 10 O.C.D. 792;
Cincinnati v. Struble, 30 O.N.P., N.S. 380;
City of Anaconga v. Clark, 395 Ill. 374, 194 N.E. 357;
City of El Paso v. Donahue, 334 S.W. 2d 185;
Cleveland Builders Supply Co. v. Garfield Hts., 102 O.A. 69;

Cleveland Trust v. Brooklyn, 92 O.A. 351;
Clifton Hills Realty v. Cincinnati, 60 O.A. 443, 21 N.E. 2d 933;
Cohn v. County Board of Supervisors of Los Angeles County, 286 P. 2d 836;
County of Lake v. Neal, 181 N.E. 2d 85;
Curtiss-Wright Corp. v. Incorporated Village of Garden City, 57 N.Y.S. 2d 377;
Curtiss v. City of Cleveland, 170 O.S. 127;
Denman v. City of Cinn., 159 N.E. 2d 805;
Denton v. Zoning Board of Review of City of Warwick, R. I., 133 A. 2d 718;
DiCarlo, State ex rel. v. Gallo, 80 O.L.A. 355;
District of Clifton in Campbell County v. Cummings, 165 Ky. 526, 177 S.W. 432;
Downey v. Sioux City, 208 Iowa 1273, 227 N.W. 125;
Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427;
Edwards Lashins v. Griffin, 132 N.Y.S. 2d 896;
Euclid v. Ambler Realty Co., 272 U.S. 365;
Euverard, State ex rel. v. Miller, 98 O.A. 283;
Feneck v. Murdock, 181 N.Y.S. 2d 441;
Forbes v. Hubbard, et al., 348 Ill. 166, 180 N.E. 767;
Franklin v. Village of Franklin Park, 167 N.E. 2d 195;
Gilpin v. Mutual Life Insurance Co. of New York, 64 N.Y.S. 2d 436;
Grant, In re: App. of, 1 O.A. 2d 84;
Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28, 115 N.E. 2d 315;
Harrison v. Reidpath, 93 N.Y.S. 2d 569;
Henle v. Euclid, 97 O.A. 528, Dismissed 162 O.S. 260;
Hudson, et al., v. Town of Oyster Bay, 248 App. Div. 737, 288 N.Y.S. 627;
Indian Refining Co. v. Amgraw River Drainage District (D.C., E.D. Ill. 1932), 1 S.F. 937;

Irving Park Building Corp. v. City of Chicago, 395 Ill. 138;
Isenbarth v. Bartnett, 205 App. Div. 546, 201 N.Y.S. 283. Affirmed 237 N.Y. 617, 143 N.E. 765;
Joseph v. City of Akron, 19 O.A. 412;
Kanter v. Board of Zoning Appeals, (Ct. of Common Pleas, Hamilton Co., 1960) 167 N.E. 2d 678;
Kessler v. Smith (Ohio), 142 N.E. 2d 231;
Kilko v. City of Cleveland, et al., 1951, 102 N.E. 476, 60 O.L.A. 457;
Kramer v. Town of Montclair, N. J., 33 N.J. Supr. 16;
Krom v. City of Elmhurst, 8 Ill. 2d 104, 133 N.E. 2d 1;
L & N Co. v. Cutler, 125 O.S. 12;
Lahmaier v. Wadsworth, 122 Conn. 571, 191 A. 539;
Land Purchasing Corp. of America v. Grunewald, 195 N.Y.S. 2d 69;
Langguth v. Village of Mt. Prospect, 5 Ill. 2d 49;
LaSalle National Bank of Chicago v. County of Cook, 12 Ill. 2d 40, 145 N.E. 2d 65;
Laville v. Zoning Board of Appeals, 145 Conn. 468, 144 A. 2d 45;
Loesch v. Newburg Heights, 69 O.L.A. 310;
Mack v. County of Cook, 11 Ill. 2d 310, 142 N.E. 2d 785;
Mahl v. Stegner, 38 O.A. 416;
Mahoney Express Co. v. Youngstown, 15 O.L.A. 745 (App.);
Marquette National Bank v. County of Cook (Ill.), 182 N.E. 2d 147;
Matter of Ballard v. Roth, 253, N.Y.S. 6;
McDonald, in re: App. of, 119 O.A. 15;
Midland Electric Corp. v. County of Knox, 1 Ill. 2d 200, 115 N.E. 2d 275;
Murdock v. Norwood, 25 O.A. 233;
Nebbia v. N. Y., 291 U.S. 502, 54 Sup. Ct. 505;
Nectow v. Cambridge, 277 U.S. Rep. 183;
O'Conner v. Moscow (Idaho), 202 P. 2d 401;

Ordinance to Rezone, 89 O.L.A. 430;
Partain v. Brooklyn, 73 O.L.A. 481;
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 Sup. Ct. 158;
People v. Calvar Corp., 286 N.Y. 419, 36 N.E. 2d 644;
Printke, State ex rel. v. Brookpark, 107 O.A. 325;
Pritz v. Messer, 112 O.S. 628;
Purity Extract Tonic Co. v. Lynch, 326 U.S. 192, 33 Sup. Ct. 44;
Schmidt v. Board of Adjustment of City of Newark, 9 N.J. 405, 88 A. 2d 607;
School Committee of Pawtucket v. Zoning Board of Review of City of Pawtucket, 133 A. 2d 734;
Shaker-Coventry Corp. v. Shaker Heights Planning Commission, 86 O.L.A. 47, affd. 115 O.A. 472, App. Dismiss, 173 O.S. 572;
Shopping Centers v. Cincinnati, 83 O.L.A. 548;
Spann v. Dallas, 111 Tex. 305, 235 S.W. 513;
State Bank Trust Co. v. Village of Willmette, 358 Ill. 311, 193 N.E. 131;
State v. Hillman, 110 Conn. 92, 147 A. 294;
State ex rel., Jack, v. Russell, 162 O.S. 281;
State ex rel. Killeen Realty Co., et al., v. City of East Cleveland, et al., 1959, 169 O.S. 375, 160 N.E. 2d 1;
Stewart v. Petigo, 2 O.A. 2d 53;
Toulouse v. Board of Zoning Adjustment, 87 A. 2d 670, 147 Me. 387;
Town of Hobart v. Collier (Wisc.), 87 N.W. 2d 868;
Town of Sommers v. Camarco, 126 N.Y.S. 2d 154;
Ullman, ex rel. Eramo v. Payne, 127 Conn. 239, 16 A. 2d 206;
Union Limestone, Inc.; State ex rel. v. Bumgardner Zoning Inspector, 110 O.A. 183;
Vernon Park Realty v. City of Mt. Vernon, 122 N.Y.S. 2d 78;

Village of Skokie v. Almendinger, 5 Ill. App. 522, 126 N.E. 2d 421;

Weber v. Vajner, 108 N.E. 2d 569, 158 O.S. 105;

Westwood Meat Market, Inc. v. McLucas (Colo.), 361 P. 2d 776;

White v. Cincinnati, 101 O.A. 160;

Wyoming, Village of, v. Walker, 1930, 27 N.P., N.S. 564;

Youngstown, City of, et al., v. Kahn Brothers Building Co., 112 O.S. 654.

Portions of Cleveland City Ordinances Claimed Unconstitutional As Applied to Appellants' Property and Questions Presented.

Appellants maintain that the portions of the Cleveland Zoning Ordinance set forth in the Appendix, at page 31, are unconstitutional as they apply to appellants' property; that the manner in which the Cleveland Zoning Ordinance was applied to the appellants' property is unconstitutional; and that the proceedings by which the City of Cleveland is the seller, complainant, judicial body, and enforcing officer, and appellee is unconstitutional.

STATEMENT OF THE CASE.

Appellants raised the constitutional question at the very earliest opportunity, namely before the Board of Zoning Appeals in the City of Cleveland (Record, page 6/6-15) and continued to press this issue at every opportunity in all of the courts thereafter by setting forth the unconstitutionality of the zoning laws as applied to appellants' property and the manner in which it was applied, etc., by assignment of error. This contention was dismissed by the three courts in Ohio, without opinion.

Inasmuch as there were several hearings before the Board of Zoning Appeals of the City of Cleveland during the year 1966, all references to the record will contain the month and the date of the hearing followed with the page number of the transcript for that particular month and date.

The subject appeal refers to property commonly known as "Woodhill Carbarns" formerly owned by the City of Cleveland (CTS) and the issues and questions involved the former use and present zoning of the subject premises. Inasmuch as the factual situation spans a period of some sixty years, we believe that it will help to exemplify those facts in the chronology of events as set forth as follows:

1907 Property owned by Cleveland Electric Railway Company and was used as a streetcar storage and repair operation.

1929 Cleveland City Zoning Ordinance passed.

1942 Private Company acquired by Cleveland Transit System (5/31-6).

1908-48 Property used for streetcar operation, storage and operating station (5/31-6).

1948 Property used for streetcar converted to trackless trolley storage and repair property (5/31-6).

6-15-63 thru date of sale Property used as trackless trolley storage yard and bus terminal (5/31-6; Exhibit I; Exhibit D).

8-1-64 Lease between City of Cleveland and J & T Tire Company, Inc. for portion of premises on a monthly basis (Item 36 in transcript).

7-13-65 Lease between City of Cleveland and Qua Buick for partial use of premises on a monthly basis (Item 36 in transcript).

9-16-65 Resolution of CTS authorizing advertising for bids (Exhibit J).

10-21-65 Resolution of CTS authorizing acceptance of Gettig Equipment Corp. or nominee (Exhibit K).

10-27-65 Deed from City of Cleveland to Gindy Manufacturing Corp. (designate of Gettig Equipment Corp.) signed by Mayor Locher (Exhibit A).

11-19-65 Aforementioned deed recorded with County Recorder.

11-30-65 Application for rezoning filed.

12- -65 Moved some vehicles upon premises for dead storage.

12-3-65 Receipt of notice concerning zoning violation.

12-7-65 Letter to Building Commissioner from Appellants.

1-8-66 Notice to vacate former premises at 5400 Harvard Ave. received by Gettig Equipment Corp. from owner (Ex. H).

1-24-66 Applied to City for Use Permit which was refused.

1-24-66 Appeal to Zoning Board filed.

6-6-66 Final Ruling of Board of Zoning Appeals.

6-25-66 Notice of appeal and precipe filed with Zoning Board and Court of Common Pleas.

7-11-66 Richard L. Gettig, President of Gettig Equipment Corp. arrested because of alleged zoning violation.

8-4-66 Motion for Summary Judgment filed.

8-10-66 Transcript filed.

8-17-66 Motion for Summary Judgment overruled.

2-3-67 Motion for Summary Judgment filed.

2-6-67 Motion for Summary Judgment overruled and Appellees granted ten days extension to file brief without notice to Appellants.

3-4-67 Memorandum Opinion and Journal Entry affirming the Ruling of the Board of Zoning Appeals filed by the Court of Common Pleas.

5-12-67 Notice of Appeal and Precipe filed in the Court of Common Pleas.

11-5-68 Journal Entry of the Court of Appeals sustaining the Common Pleas Court.

11-22-68 Notice of Appeal to the Supreme Court of the State of Ohio and Praecipe filed in the Court of Appeals.

2-26-69 Entry of the Supreme Court of the State of Ohio dismissing the appeal.

4-4-69 Notice of Appeal to the United States Supreme Court filed in the Supreme Court of Ohio and in the Court of Appeals of Ohio.

The following is a list of the individuals testifying and a brief synopsis of their position in this matter and/or their qualifications, together with an indication of which party called the witness:

Richard L. Gettig, President of Gettig Equipment Corp., who had been involved in the trucking business for some twenty years, including military service, prior to engaging in the sales, service and leasing of trailers. Called by Appellants.

Walter L. Greene, Attorney at Law, representing Gettig Equipment Corp. and Gindy Manufacturing Corp. Called by Appellants.

Lawrence McDonough, Supervisor of Properties, Cleveland Transit System, who submitted a letter which letter was offered by Appellants.

Robert F. Mooney, Legal Counsel for Cleveland Transit System, who submitted a letter at the request of the Zoning Board.

Howard Cumler, Superintendent of Transportation, Cleveland Transit System, who testified at the request of the Zoning Board.

August A. Maran, Attorney at Law, Executive Assistant to General Counsel, Acting General Counsel in the absence of the General Counsel, and Acting Secretary of the Board of the Cleveland Transit System, who although called by Appellants for Cross-examination, was called by Chairman Lasko to testify for the Board of Zoning Appeals (5/9-31).

Paul Sanislo, Councilman who represented the individual residents of the surrounding area, none of whom qualified in any areas under consideration as experts.

Edwin H. Smith, Attorney at Law, Vice President in charge of Real Estate Appraisals for Ostendorf-Morris Company, called by Appellants.

Sally Pitzer, Real Estate Broker and resident of nearby area, called by Appellants.

Mrs. Mary Timko, resident and secretary of The Buckeye Neighborhood Nationalities Civic Association, called by Appellants.

Doris Toth, Real Estate saleswoman who works in the neighborhood, called by appellants.

Appellant, Gettig Equipment Corp. deals in trailers used with tractors to haul freight, but essentially does not deal in tractors, trucks or other powered vehicles. It buys and sells these vehicles; it leases them, services them, and assembles new trailers from kits shipped in from Gindy Manufacturing Corp. It does *not* operate a truck terminal and no loading or unloading is done on its premises for business of others. (Gettig 4/18-28-33-34).

Gettig sought a permit covering these activities for the property known as "CTS—Woodhill Station" which

Appellant Gindy Manufacturing Corp. purchased on behalf of Gettig from the City of Cleveland.

A sketch of the subject premises (Ex. B) will show that the premises is uniquely designed for an operation such as the one requested. Mr. Richard L. Gettig, President of Gettig Equipment Corp., described in detail the physical layout of the premises and the proposed use. (4/18-16 et seq.) More particularly he described the "Shop Building" at pages 16 and 18. The entire yard area, where it is not covered by buildings, is of 9-inch reinforced concrete (Gettig 4/18-27).

The Woodhill Station consists of a large 4.28 acre tract fronting on one of Cleveland's busier thoroughfares, East 93rd Street-Woodhill Road. It lies between Mt. Auburn and Manor Roads. *West across East 93rd Street is land zoned for unrestricted industrial use.* Many commercial establishments actually occupy that area extending north and south of the Woodhill Station. For example, across East 93rd Street and just north of Appellant's land is a power substation of the Cleveland Electric Illuminating Company. (Smith 4/18-42; Stipulation re photo 6/6-36).

To the north across Mt. Auburn and to the South across Manor Road are primarily old, modest, two-family homes with a sprinkling of single-family residences of like age and character. There are commercial enterprises fronting along East 93rd Street in that vicinity. (Smith 4/18-41 and 42).

The subject premises has been used as a carbarns, streetcar storage and repair facility, and bus terminal from 1907 through the date of sale. (Smith, 4/18-42; Cumler, 5/31-11 and 12).

Up until the date of the sale, trackless trolleys were stored on the north two-thirds of the open area. (Cumler,

5/31-8). And also up until the date of the sale, the subject premises was used for a short turn terminal (Cumler 5/31-12). There have been no material changes in the characteristics of the property since 1907. (Smith 4/18-44).

Whereas CTS used the property 24 hours a day, 7 days a week, Gettig's use is 8½ hours a day, 5 days a week. The use of our property as requested would be less obnoxious than the previous use, that of CTS, and would not devaluate the surrounding property. (Smith 4/18-45; Pitzer, 4/18-55).

The use of our property as proposed would not be contrary to the public health, safety, morals or welfare. (Smith 4/18-48; Pitzer, 4/18-55 and 56).

Since 1927 the subject premises has been zoned for three different uses, simultaneously:

The West 150 feet for general retail;

The middle 480 feet for multi-family (maximum height of 35 feet; and

The East 30 feet for two-family (Ordinance 5.1104, Building Zone Map 5).

However, Appellants' land has never been used for any of those purposes.

Since 1907, twenty-two years before the enactment of the Zoning Code, until Appellants purchased the premises from CTS in the fall of 1965, the property has been owned by CTS or by its predecessors and retained as a terminal, first for streetcars, then trackless trolleys, and finally buses, and also as a repair yard and short turn terminal.

This property is completely covered by a 9-inch-thick layer of reinforced concrete (4/18-26 and 27). There are four structures on the tract. The former terminal, identi-

fied as Building No. 3 in the record, is a brick building situated on a portion zoned for general retail use. Building No. 2 is a large brick building on the middle part of the property, zoned for multi-family use. This building was used to wash and repair streetcars.

Another large structure is that called Building No. 1. CTS used it to repair and service trackless trolleys. It is in the rear area of the tract. (Cumler, 5/31-16).

The fourth structure, a small cement building on the easternmost portion was occupied by the dispatchers and used as a waiting place for drivers. Gettig plans to tear it down so its future use is not pertinent here. (Sanislo and Greene, 6/6-10).

The appellants paid the City of Cleveland $176,250.00 for the subject premises. (Deed, Ex. A).

The premises are worth to the Appellants, in their present condition, approximately $225,000.00. (Greene, 4/18—Smith 4/18-46).

In the event that the 9-inch reinforced concrete has to be torn up and the buildings torn down, and if the premises are not permitted to be used as Appellants have requested, and in turn the premises are to be used as strictly indicated by the Zoning Ordinance, the net value of the property would be approximately $44,000.00 (Smith 4/18-46 and 47).

The premises are uniquely suited for a purpose such as the one Appellants requested. The property is not suited to be used for anything else other than such as the use which Appellants propose, or as a carbarn, etc. (Pitzer, 4/18-35).

The letter, Exhibit D (4/18-9) was admitted into evidence, without objection, written by Lawrence McDonough, Supervisor of Properties, Cleveland Transit System, indicated that the subject premises were used

from 1907 to the present date as a "Streetcar storage and repair facility and as an operating station" and in 1948 it was "converted into a trackless trolley storage and repair property and its use as an operating station was continued."

Also there was a letter from Robert F. Mooney, Legal Counsel for CTS, to Anthony Costanzo, Secretary of the Zoning Board of Appeals of the City of Cleveland, dated April 14, 1966, stating "This is to inform you that our Woodhill Station property was sold in October of 1965. It had been used for storage facilities and to short-turn hourly equipment since June, 1963, when we discontinued the trackless trolley operation out of that station * * *." (Exhibit I).

Howard Cumler, Superintendent of Transportation of CTS, testified *at the request of the Zoning Board.* He stated that the property was used as a short-turn terminal (5/31-6) and storage of rolling stock (5/31-8) and that the northerly two-thirds of the property was used for storage of vehicles (5/31-18).

Vice Chairman Kreinberg found from the testimony of Cumler that "up to the time of the sale, approximately forty buses were using the area for a loop purpose" (5/31-12).

August A. Maran, Assistant to the General Counsel and Acting General Counsel, and Acting Secretary of the Cleveland Transit System, although called for cross-examination by Appellants, was called by Chairman Lasko to testify for the Board. (5/31-9). Mr. Maran stated that the J & T Tire Company used "one-third of the yard to the rear" in addition to Building No. 1 (which Gettig now uses for repairs and office) for their operation. (5/31-13).

Howard Cumler corroborated the same further on, on page 13, and further clarified the use at 5/13-19. There he

stated that up until the date of the sale, the subject premises was used for outside storage of buses.

August A. Maran qualified at 5/31-21 and 5/31-24 and testified as follows:

> "My findings are that the use of the property continued up until the date that the Transit Board authorized it for sale. Because it was being sold for the purpose, all this time when the Board could have at any time restarted a yard. In other words, we could have gone back in there with coaches and started to use the repair facilities again and the building there at any time. As a matter of fact, there had been discussion in between that time where we, for a time, had expected to move back the trackless trolleys back from Superior to Woodhill. And the cost would have been exorbitant, and we didn't move back."

At 5/31-5 et seq., Mr. Maran testified that he brought in the two resolutions, one authorizing the Woodhill Station to be put up for bids (Ex. 3), and the Resolution authorizing the sale to Gettig Equipment Corp. or its nominee (Ex. K). At page 36 he testified that he could find no other resolutions concerning the subject property, hence, we may say that there was no resolution by the Cleveland Transit Board to abandon the subject property.

Edwin Smith testified at 4/18-41 that across the street from the subject property, the property is "improved" with entirely industrial type real estate. He further testified at 4/18-43 that the unique characteristics of the subject property consisting of the 9-inch solid reinforced concrete and the large buildings with large doors suitable to repair and garage assembly operations since the buildings were built and the operation commenced in 1907.

In reviewing all of the foregoing, we ask the Court to consider that the test should not be whether a private

nuisance has been committed (for which the immediate neighbors would have the right to request an injunction to relieve) but whether or not the proposed use comes within the zoning ordinance and whether or not the Zoning Board abused its discretion in not applying just the evidence before it, and only accepting the reliable probative evidence.

All of the testimony of any value, that is, by any witnesses who could possibly qualify as experts, indicated that the proposed use by Appellants was less obnoxious than the former one, that of a bus terminal and repair shop. The only evidence of any kind whatsoever to the contrary was that of the immediate residents and the councilman, none of whom qualified as experts, and all of whom were admittedly interested parties to the action. Also, their complaints were not concerning the health, safety or morals and general welfare of the public, but their own offended esthetic senses.

The test should not be whether or not the immediate residents are or are not inconvenienced, but whether or not the community as a whole will suffer and whether or not the proposed use will be contrary to the public health, safety, morals and general welfare. We think that this Court should take public notice of the fact that the transportation industry is vital to the commerce, health and welfare of the community. The community depends upon commerce. If the transportation industry is not serviced, then other aspects of commerce will fail.

Also, the Court should take judicial notice of the fact that the Mayor is continually attempting to woo industry into the Cleveland area. Not only will the Appellants be required to move out of the Cleveland area, but undoubtedly some of the customers whom they service will have to look elsewhere for their sales and service.

Although a vast contingent of experts is available to the City, not one scintilla of evidence was offered by the appellees to oppose the sworn testimony of the experts who testified concerning the fact that our proposed use would not be contrary to the health, safety, morals and general welfare of the public, nor that the surrounding homes would not be devalued.

It is this writer's understanding that the Courts favor the free and unrestricted use of land; that it is universally agreed that zoning ordinances restrict the use of land without compensation to the owner; that the only constitutional authority for this deprivation of property without due process is if there is some corresponding benefit to the public.

In the instant case, appellants offered testimony that their proposed use is *not* contrary to the health, safety, welfare and morals of residents of the City of Cleveland; that their proposed use is less obnoxious than that of the City, which preceded the appellants.

Appellees offered *not one scintilla of evidence* that appellants proposed use *was* contrary to the health, safety, welfare and morals of the residents of the City of Cleveland. There is not one such shred of evidence in the entire record. Appellees offered some evidence that appellants' use offended the esthetic senses of the surrounding neighbors. This may or may not be true, but under any circumstances it could readily have been cured by an order granting a variance stipulating that hedges should surround appellants' property, thereby screening the alleged offenses from the neighbors. The corresponding depreciation of some 80% in value to appellants' property as compared to a beautiful hedge around the property screening off these alleged offenses from the neighborhood

amply shows that balancing of conveniences was not considered by the Board of Zoning Appeals.

Appellees have made much of the fact that appellants knew the zoning when it bought the subject premises. This is true, but appellants also knew what use had been made of the property and what use they proposed to make of the property and considered at the time their use was less obnoxious, and was not contrary to the health, safety, welfare and morals of the residents of the City of Cleveland. A variance granted for the use of property to a prior owner is not personal to that prior owner at the time of the grant, but is available to any subsequent owner.

In the only opinion written in this case (that of the Common Pleas Court of Cuyahoga County) it is stated that the Court of Appeals found that there had *not* been found a total abandonment of the property. It is beyond the comprehension of this writer that there can be a partial abandonment of one parcel of real estate which for some sixty years had been totally used for one general purpose. That would be like being partially pregnant.

The property consists of 4¼ acres of reinforced concrete which had been used from 1907 until the date of sale as a motor vehicle (bus and street car) car barn, depot, storage yard and repair facility. This evidence was obtained from a witness brought to the Board by the Board of Zoning Appeals, itself (not by appellants).

In the opinion referred to above, the one and only time there is gleaned from the record any indication that appellants' proposed use would be more objectional and offensive than the prior uses is the statement of the Board of Zoning Appeals' member, Mr. Kreinberg. He states that it would appear to him that the proposed use would

be more objectionable and offensive. But he does not state where in the record there is such testimony, nor has counsel for appellant ever found in the record where there is such evidence. **And it is not in the record.** We challenge the appellees to cite to this Court any place in the record where there is any substantial, probative evidence to indicate that the proposed substituted use is either more obnoxious or more harmful than the prior use, or that the proposed use is contrary to the health, safety, morals or general welfare of the residents of the City of Cleveland.

The ruling of the Board of Zoning Appeals of the City of Cleveland creates an anomoly. It creates a non-conforming island (the repair shop) in a sea of residential property, the strict application of which would prohibit the bringing of vehicles to the non-conforming repair shop in the rear of the property. The non-conforming use of the property in the rear would destroy the value of the property in the front and the conforming use of the property in the front destroys the value of the property to the rear.

Clearly, depriving appellants of their proposed use of the property as set forth in their application, without just compensation and depriving them of 80% of the value of their property is contrary to the Fifth Amendment and Section 1 of the Fourteenth Amendment of the United States Constitution.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

The right of every owner of property to use it in his own way for his own purposes existed before the adoption of a constitution, and is guaranteed by that instrument. The police powers may only restrict this right when they are exercised for the interest of public peace, order, morals, safety, comfort and convenience and the general welfare. When they are exercised in such a way that they are arbitrary, unreasonable, and/or confiscatory they will be held to be unconstitutional.

A ruling by a Zoning Board of Appeals, sustained by the Appellate Courts, which deprives appellants of the free use of their land without just compensation; which deprives them of 80% of the value of their land without just compensation; which record does not have one scintilla of evidence in it indicating that the proposed use of the subject premises by appellants is contrary to the health, safety, welfare, and morals, and such proposed use is not more obnoxious or objectionable than the previous use; and during the entire proceedings the appellees are the sellers, complainants, judicial body, and enforcing officers, is unconstitutional in that it violates the Fifth Amendment and the first Section of the Fourteenth Amendment of the United States Constitution, in that the application of the zoning laws is arbitrary, unreasonable, confiscatory, capricious and discriminatory. This case, as it is now constituted stands for the proposition that a Board of Zoning Appeals can rule without any evidence before it, as it feels the evidence should have been, and virtually destroy the use of land at its own whim and caprice, contrary to the constitutional guarantees.

CONCLUSION.

In the instant case the appellants have proved unnecessary hardship, practical difficulty, non-conforming rights, proposed use being less obnoxious and less objectional than the prior use, and that the proposed use is not contrary to the health, safety, morals and general welfare of the residents of the City of Cleveland, and that application of the zoning law would create virtual destruction of the value of their property. The appellees, on the other hand, have not assailed any one of these important factors. The appellants have proved that the application of the zoning laws of the City of Cleveland to their property is arbitrary, unreasonable, and, confiscatory.

It is respectfully submitted that aside from the great financial loss appellants would sustain if appellees are permitted to violate appellants' constitutional rights, this case should be heard on the merits and reversed with the admonition that no quasi judicial body can trample the rights of individuals into the earth; that their decisions must be based on some fact and not on pure whim or caprice, or conjured evidence which is not of record; that a zoning board of appeals cannot be arbitrary and make its own personal standards, its decision must conform to the standards laid down by the zoning ordinance itself, that is, it must relate to the health, safety, morals and welfare of the populace in general, and cannot be determined by the convenience of the few citizens surrounding the area. These property rights are as sacred as one's personal rights and should be guarded as carefully as one's right to life, liberty and the pursuit of happiness.

Respectfully submitted,

WALTER L. GREENE,
Attorney for Appellants.

APPENDIX.

RULING OF THE BOARD OF ZONING APPEALS.

The Board of Appeals at its meeting Monday, June 6, 1966 voted to grant the permit requested in Calendar No. 66-56 subject to the requirements of the Building Code.

The substitution is granted on condition that the use of the repair building (1) near the east end of the property is permitted, the car wash building (2) midway back along the north property line is not used for fabricating. The office building in the Retail district in the northwest corner of the property may be used for a conforming use, but the yard may not be used for vehicular storage.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

Decision of the Board of Zoning Appeals of the City of Cleveland is affirmed (opinion filed).

JOHN V. CORRIGAN, *Judge.*

Filed: May 4, 1967.

MEMORANDUM OPINION OF THE COURT OF COMMON PLEAS.

The appellants have appealed to this Court from a portion of the rulings of the Board of Zoning Appeals which rulings were finalized on June 6, 1966, and which rulings partially affirmed the decision of the Building Commissioner to refuse the appellants the unrestricted right to use the property located at 3049-55 East 93rd Street, Cleveland, for wholesale and retail sales, service, leasing and fabricating of all kinds of vehicles on the property and in the existing buildings.

As stated in their Notice of Appeal, the appellants more specifically appeal from the portion of the ruling which qualifies the granting of the use permit and states as follows:

> "* * * the car wash building (2) midway back along the northerly property line is not used for fabricating. The office building in the retail district in the northwest corner of the property may be used for a conforming use. But the yard may not be used 'for vehicular storage.' "

Between 1907 and 1963 the 279' x 660' parcel of property in question was used by the Cleveland Electric Railway Company and beginning in 1942 by the Cleveland Transit System as a streetcar and trackless trolley operating, storage and repair area commonly called the Woodhill Station. The Superintendent of Transportation, Mr. Howard Cumler testified that in 1948 it was converted from a streetcar operation to a trackless trolley, storage and repair property and "that continued up to June 15, 1963, when we had the last day of operation and repair at that location." Under questioning by Chairman Lasko, Mr. Cumler said that within the year ("I haven't got the dates") the wires were removed and there was no use of this property for the purpose of storing these trackless trolleys. On October 27, 1965, the City of Cleveland conveyed the property to the highest bidder, the Gindy Manufacturing Company as the designate of Gettig Equipment Corporation.

The appellants purchased the property subject to the existing zoning ordinances including three classifications on the single parcel of general retail, multi-family and B-2 family districts. An attempt to have City Council rezone the entire parcel to a semi-industry classification having failed, the appellants lodged this appeal with the Board

of Zoning Appeals. It was their contention that they are entitled to exercise certain rights under the conforming uses previously established by the Cleveland Transit System and two short-term tenants of the property between the end of the public transit operation and their purchase of the parcel in question.

Recognizing that the Board does have the power to grant a substitution as to non-conforming rights, counsel for the City argued that the question of substitution has no application here because all the facts indicate that the non-conforming uses had been abandoned. He cited Section 5.1134 of the Codified Ordinances of the City of Cleveland which provides that once a non-conforming use has been abandoned it shall not thereafter be returned. It further provides that a non-conforming use is considered abandoned either when the intent to discontinue is apparent, or, when the characteristic equipment and furnishings have been removed and are not replaced within two years.

The Board, however, rejected this complete abandonment theory and turned its attention to the question of substitution and a consideration of the extent of the rights to which the appellants are entitled. Section 5.1132 dealing with this question provides:

> "* * * and no substitution or other change in such non-conforming use to other than a conforming use shall be permitted except by special permit from the Board of Zoning Appeals. Such special permit may be issued only if said Board finds after a public hearing that such substitution or other change is no more harmful or objectionable than the previous non-conforming use in floor or other space occupied, in volume of trade or production or kind of goods sold or produced, in daily hours or other period of use, in the type or number of persons to occupy or to be at-

tracted to the premises, or in any other characteristic of the new use as compared with the previous use."

With reference to the three buildings located on the property the Board determined that some non-conforming rights were established as to Building No. 1 because of the previous use by the CTS and its subsequent lessee, the J and T Tire Company, as a shop building for repairs. Parenthetically it should be noted that the lease was limited to the building only, making no provision for the parking or storage of vehicles. As to Building No. 2 it found that said building had been used primarily for a wash rack and that the appellants did not establish any right to expand the use into a building for fabricating and assembling all kinds of vehicles. Finding that Building No. 3 was an office building located in the General Retail District portion of the parcel, the Board ruled it may be used for administrative purposes as a proper conforming use. Finally, the ruling of the Board flatly refused the use of the yard for the vehicular storage contemplated and actually in use by the appellants.

The evidence on the use of the open lot following the termination of operation by the CTS was somewhat conflicting. Apparently for a period of time some trackless trolleys remained on the premises. The J and T Tire Company, although the lease was for the building only, allowed some trucks to be parked around Building No. 1. Later Qua Buick Company stored some new cars in the lot, *and the CTS used some of the pavement as a short-term loop for buses up until the time of the actual sale.*

Counsel for the appellants attempted to show that they were entitled to enjoy the same rights by a substitution or a variance under the ordinance. In the transcript of the proceedings before the Board can be found a discussion between said counsel and Board Member Kreinberg

on the question of vehicular storage. The latter stated that in his opinion such rights had been abandoned and that the appellants had no rights now to use this property for the storage of trucks and trailers. Mr. Kreinberg, just prior to offering the motion, unanimously adopted by the Board, commented:

> "In any event, it would appear to me that the use you are now contemplating, with the trailers, the flat beds, the van-type trucks, trailers, the tank type trailers, that you are exceeding the non-conforming rights that have been established on this property. The parking, maneuvering, the gas fumes, and things that will emanate from this type of thing, in my opinion, is more objectionable and more offensive than the uses that have been established by the CTS."

When this property was advertised for sale the appellants purchased it notwithstanding the existing zoning ordinances feeling it would make an ideal location for their operations because of the existing buildings and the extensive pavement covering the lot. Failing in their attempt to rezone the parcel to a Semi-Industry classification because of the nature of its intended business, they asserted their rights to come within the established non-conforming uses.

Obviously the Board realizing that the area in question is surrounded on three sides by a well-established modest residential development and recalling that the use of the area had been almost exclusively for the operation and maintenance of electric streetcars and trackless trolleys has denied the appellants the unrestricted right they have sought to use the property for, the fabricating of all kinds of vehicles in the existing buildings and the storage of all kinds of vehicles, both of which would clearly exceed any non-conforming rights. The type of operation con-

templated by the appellants goes beyond any non-conforming uses previously made of the buildings and premises in question. Generally a non-conforming use in existence when a zoning ordinance is enacted, as was the case here, cannot be changed into some other non-conforming use. Fabrication and assembling of all types of vehicles is a substantially different use from the non-conforming use of repairing and washing streetcars and trackless trolleys.

In its decision the Board felt compelled to recognize the non-conforming rights as to the use of Building No. 1 because of the continuing use of that building for repairs first by CTS and then by the J and T Tire Co. The other uses sought principally in the residential sections of the parcel by the appellants in the Board's view exceeded any non-conforming uses previously established and were considered to be more objectionable or harmful.

In the light of the facts developed in this case, particularly as to the known existence of the zoning ordinances by the appellants when they purchased the property, the Court finds no abuse of discretion by the Board in refusing to grant a variance herein. Since there is no showing of any fraud, chicanery, or misleading statements by the City in selling the property, the Court sees no constitutional violation or conflict by the City acting herein in various capacities as "the Seller, the complainant, the judicial body, the enforcing officer and the appellee."

The claim that the enforcement of the ordinance would amount to an unconstitutional confiscation of their property because of the characteristics and uniqueness of the premises is likewise of little merit since the appellants purchased it subject to said ordinances. Any hardship they now claim in this regard has been strictly self-imposed.

After a thorough review of the pleadings, the record and the very extensive briefs of counsel and an application of the pertinent law, this Court affirms the decision of the Board of Zoning Appeals of the City of Cleveland at the costs of the appellants.

s/ JOHN V. CORRIGAN, *Judge.*

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Entered November 5, 1968.)

This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed and it is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

IT IS ORDERED that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution.

RULING OF THE SUPREME COURT OF OHIO.

February 26, 1969

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be

sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

NOTICE OF APPEAL

To The Supreme Court of The United States:

I. Notice is hereby given that Gettig Equipment Corp. and Gindy Manufacturing Corp., the appellants above-named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of the State of Ohio dismissing the appeal of the appellants from the Court of Appeals for Cuyahoga County, Ohio, and entered in this action on February 26, 1969.

The appeal is taken pursuant to 28 U.S.C. 1257 (2).

II. The Court will please prepare a transcript of the record in this cause, for transmission to the Supreme Court of the United States and include in said transcript the following:

A certified record of the entire case.

III. The following questions are presented by this appeal:

1. The zoning ordinance of the City of Cleveland, as applied to appellants' property is unconstitutional.

2. The manner in which the Cleveland zoning ordinance was applied to appellants' property is unconstitutional.

3. The proceeding by which the City of Cleveland is the seller, complainant, judicial body, enforcing officer, and appellee is unconstitutional.

Respectfully submitted,

WALTER L. GREENE,

Attorney for Gettig Equipment Corp. and Gindy Manufacturing Corp., Appellants.

RELEVANT PROVISIONS OF CLEVELAND ZONING ORDINANCE.

§ 5.1101 [981] Interpretation and Purpose.

(a) In interpreting and applying the provisions of this Chapter they shall be held to be the minimum requirements adopted for the promotion of public health, safety, morals and general welfare.

* * * * *

§ 5.1112 General Retail Business Districts.

(a) Definition. For the purpose of this Chapter general retail business is defined as an enterprise for profit for the convenience and service of, and dealing directly with, and accessible to, the ultimate consumer; neither injuries to adjacent premises or to the occupants thereof by reason of the omission of cinders, dust, fumes, noise, odors, refuse matter, smoke, vapor, or vibration; nor dangerous to life or property. It shall include buildings or spaces necessary to a permitted use for making or storing articles to be sold at retail on the premises. Except as provided in (b) of this Section it shall not include any establishment which supplies a retail outlet other than that on the premises, or any building or use specifically mentioned as permitted only in a Semi-Industry or Industry District.

(b) Permitted Building and Uses.

The following buildings and uses are permitted in a General Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged, or designed to be used, in whole or in part for other than one or more of the following specified uses:

1. Except as otherwise provided in this Chapter, all uses permitted and as regulated in any Local Retail Business District.

2. All Retail Business uses and buildings specified in Section 5.1111 (b), and uses and buildings to provide for:

* * * * *

2i. Automotive Services: In addition to the uses permitted in Local Retail Districts: service station; service garage; automobile laundry; provided the premises are located not less than 100 feet from a Residence District; parking lot; lot for the sale of new and second-hand motor vehicles or trailers except those of not more than 2 tons net weight, provided that all vehicles, advertising matter, and all structures, movable or fixed, are kept back of a structurally sound barrier at least 1½ feet high, located as follows:

2i-1. Where the building line is back of the street line, the barrier shall be located on or back of the setback building line.

2i-2. Where the street line is the building line, the barrier shall be located 5 feet back of the street line.

2i-3. Where the distance from the street line to the front lines of the nearest buildings at the sides of the premises and within 100 feet of the premises is less than that required by sub-paragraphs 2i-1 and 2i-2, the barrier may be erected to a line joining the near front corners of such buildings, or at the average distance of such buildings from the street line.

All lots for the sale of new and second hand motor vehicles, except those of not more than two tons net weight, shall have an asphalt, concrete or other hard, dust-free surface of not less than 180 sq. ft. per car displayed, and, if business is conducted after 6:00 p.m., shall be lighted in such a manner that every part of such lot is visible.

* * * * *

2m. Transportation Services: Railroad station; public service station; bus passenger station; bus terminal; provided the roadway of the street upon which the bus entrance or exit is located is at least 44 feet wide between curbs.

§ 5.1115 [981-12] Semi-Industry Districts.

(a) Definition. For the purpose of this Chapter a Semi-Industry District is defined as an area usually adjacent to a Retail Business or more restricted Use District, in which storage, wholesaling, passenger or motor-freight transportation terminals, light manufacturing, and other semi-industrial operations of such nature as not to be detrimental to an adjacent Retail Business or more restricted Use District, are permitted.

(b) Permitted Buildings and Uses. Within any Semi-Industry District no building or premises shall hereafter be erected, altered, used, arranged, or designed to be used, in whole or in part for other than one or more of the following specified uses; provided that all resulting cinders, dust, flashing, fumes, gases, odors, refuse matter, smoke, and vapor either are effectively confined to the premises or are disposed of in a manner which will not create a nuisance or hazard to safety or health, and provided further that noise and vibration are effectively prevented from being audible or perceptible at a distance of 50 feet from such premises.

1. Except as otherwise provided in this Chapter, all uses permitted and as regulated in a Retail Business District; provided, however, that after the effective date of this Code no dwelling house, row house, or multiple dwelling, and no building of Institutional H Occupancy classification, shall be located within 200 feet of the boundary line of an adjoining General or Unrestricted

Industry District, and no existing building within 200 feet of such boundary line shall be converted or altered to any such use, except that the Board of Zoning Appeals may, in specific instances, permit such ereetion, conversion, or alteration when the development of the immediately surrounding area is essentially residential in character and the erection or establishment of an additional residence building would not be incompatible with or hamper or obstruct the use of the District and the adjoining Districts for the uses for which they are intended, and except that the Board of Zoning Appeals may grant special permission for temporary dwellings, or for permanent dwellings for a limited number of personnel required to reside on the premises of a permitted use for the safe and proper operation of that use.

2. The following additional commercial and semi-industrial buildings and uses:

2a. Second-hand truck lot.

2b. Repair garage for repair or painting of motor vehicles, provided that such use is located not less than 100 feet from a Residence District.

* * * * *

§ 5.1132 [981-29] Existing Non-Conforming Buildings and Uses.

(a) Except as provided in Section 5.1133 a use of building or land lawfully existing on the effective date of this Chapter or of any amendment or supplement thereto, or for which a permit has been lawfully issued, may be continued even though such use does not conform to the provisions of this Chapter for the Use District in which it is located, but no enlargement or expansion shall be permitted except as a variance under the terms of Section 5.1166 and no substitution or other change in such nonconforming use to other than a conforming use shall be

permitted except by special permit from the Board of Zoning Appeals. Such special permit may be issued only if said Board finds after public hearing that such substitution or other change is no more harmful or objectionable than the previous non-conforming use in floor or other space occupied, in volume of trade or production or kind of goods sold or produced, in daily hours or other period of use, in the type or number of persons to occupy or to be attracted to the premises, or in any other characteristic of the new use as compared with the previous use.

(b) The enactment of this Chapter shall not in any way affect the force and legality of previous orders requiring the discontinuance of non-conforming uses nor extend the time limit already established when existing non-conforming uses shall be discontinued.

§ 5.1134 [981-31] Abandonment of Non-Conforming Use.

(a) A non-conforming use of a building or premises which has been abandoned shall not thereafter be returned to such non-conforming use.

(b) A non-conforming use shall be considered abandoned:

1. When the intent of the owner to discontinue the use is apparent, or,

2. When the characteristic equipment and the furnishings of the non-conforming use have been removed from the premises and have not been replaced by similar equipment within two years, unless other facts show intention to resume the non-conforming use, or,

3. When it has been replaced by a conforming use, or,

4. When it has been changed to another use under permit from the Board of Zoning Appeals.

§ 5.1166. [981-63] Board of Zoning Appeals.

* * * * *

(b) Jurisdiction and Power of the Board of Zoning Appeals.

1. The Board of Zoning Appeals shall have such duties and powers as are set forth and as limited in the Charter and in this Chapter.

2. The Board shall adopt such rules or regulations as may be necessary to carry into effect the provisions of this Chapter and to exercise the powers and jurisdiction conferred upon it by the Charter and this Chapter.

* * * * *

(c) Variance Powers of the Board of Zoning Appeals.

1. Where there is practical difficulty or unnecessary hardship in the way of carrying out the strict letter of the provisions of this Chapter, the Board of Zoning Appeals shall have the power, in a specific case, to vary or modify the application of any such provisions in harmony with the general purpose and intent of this Chapter so that public health, safety, morals and general welfare may be safeguarded and substantial justice done.

2. Limitation of Variance Powers. Such variance shall be limited to specific cases where:

2a. The practical difficulty or unnecessary hardship inheres in and is peculiar to the premises sought to be built upon or used because of physical size, shape, or other characteristics of the premises or adjoining premises which differentiate it from other premises in the same District and create a difficulty or hardship caused by a strict application of the provisions of this Chapter not generally shared by other land or buildings in the same District; and

2b. Refusal of the variance appealed for will deprive the owner of substantial property rights; and

2c. Granting of the variance appealed for will not be contrary to the purpose and intent of the provisions of this Chapter.

3. Data on Which Variance Is Based. When appealing for a variance, the appellant shall state and substantiate his claim that the three conditions listed under paragraph (2) of this Subsection exist, and the Board shall make a finding on each of the three conditions as they apply in each specific case as a prerequisite for the granting of the variance.

4. Variance from Use Regulations.

4a. The Board of Zoning Appeals may permit, in any Use District, the extension of a building or use existing on the effective date of the Use Regulations of the area, into adjoining land in a more restricted District, which land was under the same ownership on said effective date, under such conditions as will safeguard the character of the more restricted District.

4b. The Board of Zoning Appeals may permit the extension or enlargement of a building or use, or the erection of an additional building, upon premises lawfully occupied by such building or use on November 5, 1929 or lawfully occupied on the date of any amendment or supplement to the Zoning Ordinance approved by the electorate on that date, or to this Chapter, creating a more restricted Use District, and in which more restricted Use District the building or use thereby became a non-conforming building or use, provided that such extension, enlargement, or additional building shall not tend to perpetuate a non-conformity which otherwise might be discontinued at an earlier date.

* * * * *

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JUN 19 1969
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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 134

GETTIG EQUIPMENT CORP., *et al.*,
Appellants,

vs.

BOARD OF ZONING APPEALS, *et al.*,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

MOTION OF APPELLEES TO DISMISS OR AFFIRM.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1416.

GETTIG EQUIPMENT CORP., *et al.*,

Appellants,

vs.

BOARD OF ZONING APPEALS, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

MOTION OF APPELLEES TO DISMISS OR AFFIRM

SUPPLEMENTAL STATEMENT OF FACTS.

In the interest of brevity, we will only mention those additional facts as we deem necessary so that this Court may fully understand the case.

The Cleveland Transit System is a wholly owned utility of the City of Cleveland and is managed by five (5) transit board members, each of whom is appointed in a different year, by the Mayor for a five (5) year term. It has its own legal department, claims section, pays taxes to the City of Cleveland, and is generally operated independently of the City.

In September, 1965, the Cleveland Transit Board, being desirous of selling the property involved in this case, advertised and invited any interested persons to tender their offer for this property. *This invitation to the prospective bidders fully set forth how this particular parcel*

was zoned. The Appellants were the highest bidder and subsequently the property was sold to them on the 19th day of November, 1965.

Thereafter, on January 12, 1966, the Appellant was ordered by his former landlord to vacate his property by February 1, 1966, or pay a rental charge of One Hundred Dollars ($100.00) per day.

Without having obtained a permit as required by the City of Cleveland, they immediately moved their business to the property involved herein.

The Appellant, realizing they had no right to use the property as it was zoned for their operation, attempted in the first instance to have the property rezoned for semi-industrial use. Upon failing in this attempt, they appealed to the Cleveland Board of Zoning Appeals, seeking a variance. The Board, after four hearings, extending over a period of some four months, refused to grant a variance.

It should be noted by this Court that this parcel of land is surrounded on three sides by well maintained residential property and on the west side by a rather wide city street.

Their application for a permit requested permission for "retail and wholesale sales, service, leasing and fabricating of all kinds of vehicles." In particular, their operation consisted of assembling, repairing, storage and the sale of large twenty to forty foot trailers as used in tractor trailer rigs, some of which were badly damaged in highway accidents. There would also be some sales and storage of used tractors, all of this in an area surrounded on three sides by well maintained residences.

The property had been used continuously from 1907 for street car storage, service and turn-around and later for trackless trolleys. The City of Cleveland adopted their first Comprehensive Zoning Ordinance on November 5

1929. Since the use of the property by the Cleveland Electric Railway Company and thereafter by its successor, the Cleveland Transit System, existed continuously since 1907, they had established a non-conforming use and had a legal right to continue that use.

The testimony disclosed that this non-conforming use was continued until approximately June 15, 1963 and not until November 19, 1965 as claimed by the Appellant.

Furthermore, and contrary to the claims of the Appellant, Councilman Sanislo, Mr. Hlwak, Mrs. Virag and Mrs. Sopko, who were spokesmen for the area residents, testified that the operation by Gettig was more harmful, offensive and unsightly than the prior use.

In addition, Mr. Gettig, the president of the Appellant companies, stated that he knew prior to the bidding what the zoning was (4/18—p. 23), he was not misled by the Cleveland Transit System (4/18—p. 23), and further, that he was told that the Cleveland Transit System discontinued using the property two years prior to his purchase (4/18—pp. 24, 25).

Contrary to several statements made in Appellant's Jurisdictional Statement, there was substantial testimony indicating that the proposed use would be more harmful and a far greater non-conforming use than that which previously existed, see Memorandum of Opinion of the Court of Common Pleas as contained in Appellant's Brief, pages 27 and 28.

Furthermore, contrary to the italicized statement made on page 12 of the Appellant's Jurisdictional Statement, the property located west across East 93rd Street is zoned for semi-industrial use and not unrestricted industrial use.

ARGUMENT.

(1) Right of City to Dispose of Property.

The right of a municipality or a division thereof to sell or convey real property is given to such municipality by Article XVIII of the Constitution of the State of Ohio and has been so held by the Supreme Court of Ohio. *Babin v. City of Ashland*, 160 Ohio State Reports 328, 116 N.E. 2d 580, *State ex rel. Leach v. Redich*, 168 Ohio State Reports 543, 157 N.E. 2d 106.

(2) Police Powers.

Article XVIII, Section 3 of the Constitution of the State of Ohio gives the power to municipalities the right to adopt and enforce within their own corporate limits police regulations. The only limitation being that the exercise of that power by a municipality shall not conflict with the general laws of the State. *Greenberg v. Cleveland*, 98 Ohio State Reports 282, 120 N.E. 829; *Village of West Jefferson v. Robinson*, 1 Ohio State Reports 2d 113, 205 N.E. 2d 382.

The Supreme Court of Ohio in 1925 determined that zoning laws were a valid exercise of the police power. *Pritz v. Messer* (1925), 112 Ohio State Reports 628, 149 N.E. 30. Thereafter in the landmark case this Court upheld the constitutionality of Zoning, *Village of Euclid, et al v. Ambler Realty*, 47 S. Ct. 114, 272 U.S. 365, 71 L. Ed. 303, and further stated that regulations excluding businesses from residential areas are valid.

Since the property involved in this appeal is surrounded on three sides by well maintained residential property and on the fourth side by a wide city street, the desirability of keeping industrial uses from this area is obvious. Since this ordinance is clearly not arbitrary, a

Court will not substitute its judgment for that of a municipal legislative body. *Zahn v. Board of Public Works City of Los Angeles*, 47 S. Ct. 594, 274 U.S. 325, 71 L. Ed. 1074. Furthermore, this Court held in this latter case even though the property had a greater value for business purposes than it had as zoned for residential purposes, the ordinance was not clearly unreasonable.

(3) Due Process and Equal Protection

As admitted by Mr. Getty, president of Appellant companies, he purchased said property knowing what the zoning was, and he was not deceived in any way by the seller, the Cleveland Transit System. *After acquiring this property he was in no way deprived of any rights extended to each and every other property owner.* He first sought to have the property rezoned, a purely legislative function. Failing here he was permitted to appeal to the Board of Zoning Appeals in order to seek a variance. And finally he was afforded judicial review, both the Court of Common Pleas and the Court of Appeals have completely reviewed the record and found no error. The Supreme Court of Ohio refused to hear the matter, determining that no substantial constitutional question was involved.

Classification adopted by the State in the exercise of the police power which has a reasonable basis will be sustained against an attack based on the equal protection clause of the Fourteenth Amendment of the United States Constitution. *Cresent Cotton Oil Co. v. State of Mississippi*, 42 S. Ct. 42, 257 U.S. 129, 66 L. Ed. 166.

An owner of property is not denied equal protection because of nondiscrimination or classification between commercial and residential property. *Welch v. Swasey*, 29 S. Ct. 567, 214 U.S. 91, 53 L. Ed. 923.

Reasonable classification based on the police powers has been considered and upheld by this Court. *Northwest Laundry v. City of Des Moines*, 36 S. Ct. 206, 293 U.S. 486, 60 L. Ed. 396; *Zucht v. King*, 43 S. Ct. 24, 260 U.S. 174, 67 L. Ed. 194; *Gorub v. Fox*, 47 S. Ct. 675, 274 U.S. 603, 71 L. Ed. 1228.

While there is no set or exact definition of due process, which would encompass all situations, a general definition is set forth in 16 *Am. Jur.* 2d Constitutional Law § 546.

> "A genial law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike, is due process of law."

Here the Appellant was treated in the same manner as any other property owner. He was not penalized because he purchased the property from a division of the City of Cleveland nor was he extended special rights and privileges.

CONCLUSION.

Having purchased this property knowing that it was surrounded on three sides by well maintained residences, knowing how it was zoned and admitting no deception was involved, the appellant thereafter was afforded the same rights as every other owner. The evidence clearly supported the decision of the Cleveland Board of Zoning Appeals and the Courts so found. Wherefore, we ask that this Court dismiss this action or affirm the decision of the lower courts.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 136

GETTIG EQUIPMENT CORP. and
GINDY MANUFACTURING CORP.,

Appellants,

vs.

BOARD OF ZONING APPEALS,
CITY OF CLEVELAND,
NATHAN H. SINGER, COMMISSIONER,

Appellees.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF IN OPPOSITION TO MOTION OF APPELLEES TO DISMISS OR AFFIRM.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

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COMMENTS IN REGARD TO SUPPLEMENTAL STATEMENT OF FACTS.

At page 2, Appellees state that the hearings before the Board of Zoning Appeals extended over four months. This is true. This also accentuates the void in Appellees case wherein during this entire four-month period they did not provide one expert to state that the proposed use of Appellants was contrary to the health, safety, welfare and morals of the community, or was more obnoxious or harmful.

At page 20 of their jurisdictional statement Appellants challenged the Appellees "to cite to this Court any place

in the record where there is any substantial, probative evidence to indicate that the proposed substituted use is either more obnoxious or more harmful than the prior use, or that the proposed use is contrary to the health, safety, and morals and general welfare of the residents of the City of Cleveland." Nowhere in their motion to dismiss or affirm or the statement of fact or argument do Appellees cite such evidence to the court. At page 3 of their Brief they say that there is testimony that the proposed use is more "harmful" but nowhere do they state where in the record this testimony appears.

At page 2 Appellees, referring to Appellants, state "their application for a permit requested permission for 'retail and wholesale sales, service, leasing and fabricating of all kinds of vehicles' in particular their operation consisted of assembling, repairing, storage and the sale of large 20 to 40 foot trailers as used in tractor trailer rigs." It should be noted that the Board of Zoning Appeals gave permission to Appellants to use a portion of the premises for the "*repairing*" of such trailers. It would seem to this writer that this would be the most obnoxious of the uses requested, and that the other uses requested are less obnoxious and merely ancillary to the repairing and sales (which was *not* granted) of such vehicles.

At page 3 the Appellees admit that the Cleveland Transit System had "established a nonconforming use." They go on to state that the nonconforming use was discontinued on June 15, 1963.

In the record at 5/31-21 & 24 August A. Maran acting chief counsel for the Transit Board stated "my findings are that the use of the property continued up until the date that the Transit Board authorized it for sale." This date was September 1965, a month or two before Appellants purchased the subject premises.

In a letter dated April 14, 1966 from Robert F. Mooney, chief legal counsel of the Cleveland Transit System, to the Secretary of the Board of Zoning Appeals in regard to the subject property, Mr. Mooney stated "this is to inform you that our Woodhill Station property was sold in October of 1965. It had been used for storage facilities and to short-turn our equipment *since* June, 1963 * * *" (Emphasis supplied).

Howard Cumler, Superintendent of Transportation of C.T.S., testified *at the request of the Zoning Board.* He stated that the property was used as a short-turn terminal (5/31-6) and storage of rolling stock (5/31-8) and that the northerly two-thirds of the property was used for storage of vehicles (5/31-18).

Vice-Chairman Kreinberg (of the Board of Zoning Appeals) found from the testimony of Cumler that "up to the time of the sale, approximately 40 buses were using the area for a loop purpose" (5/31-12).

Mr. Cumler further stated at 5/31-13 & 19 that up to the date of sale the subject premises was used for outside storage of buses.

All of the foregoing is simply to show that there was no abandonment of nonconforming uses which were more obnoxious and/or harmful than the use proposed by Appellants.

At page 3 Appellees state that Mr. Gettig knew of the existing zoning, but they omit the fact that he also knew what its current use was.

They go on further to indicate that Gettig knew that C.T.S. had discontinued the using the property two years prior to his purchase (4/18-24, 25). This is not true. The Chairman began to press Gettig as to the discontinuance of a use, but he did not say specifically which use was discontinued and then finally at page 25 Mr. Gettig states

"they told me it was approximately two years prior to the time of the advertising," but this does not define which particular use they are talking about and further on page 25 Mr. Gettig says "I do not recall any specific time in our discussion except that at the time of our discussion I knew they were no longer using it for their service area. They had moved out of the property." It would seem to this writer that the important factor is not whether Gettig knew or thought he knew that it was approximately two years prior thereto or some other time or had made a mistake, but the true facts as elicited from the witnesses supplied by the Cleveland Transit System at the request of the Board of Zoning Appeals should control.

At the bottom of page 3 Appellees correct Appellants insofar as the zoning across the street from the subject premises. It is true, Appellants were in error. The zoning for the first approximately 100 feet west of Appellants' property is semi-industry and west thereafter it is general industry, and the property descends into what is known as the industrial valley of Cleveland where there are steel mills and other types of heavy industry.

ARGUMENT.

By and large Appellants do not take issue with the cases cited by Appellees. They simply do not apply to the issues raised in the Appeal.

We take issue with the statement in the last line of page 4 where Appellees state "since this ordinance is clearly not arbitrary, a court will not substitute its judgment for that of a municipal legislative body * * *." We do not say that the ordinance is arbitrary, we say that the *application* of this particular ordinance to this particular parcel of real estate is arbitrary, unreasonable and confiscatory.

We take issue with the italicized statement of page 5 "after acquiring this property he was in no way deprived of any rights extended to each and every other property owner." Nonconforming rights adhere to the land, not the owner. If the City of Cleveland itself and its Cleveland Transit Board had nonconforming rights to use the subject property for storage of vehicles and a short-turn terminal and the record discloses that our proposed use was not contrary to the health, safety, morals or general welfare of the residents of the City of Cleveland and was no more harmful or obnoxious, then the Board of Appeals abused its discretion in not granting a variance, the same variance they had granted the previous owner. Hence, the present owner has been deprived of property rights extended to the prior owner.

Appellants respectfully request permission to adopt, by reference, their jurisdictional statement as if fully rewritten herein, and make it a part of this Answer Brief.

Appellants urgently request the Court to overrule Appellees' Motion and to permit this cause to be heard upon the merits.

Respectfully submitted,

WALTER L. GREENE,

Attorney for Appellants.

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

GETTIG EQUIPMENT CORP. ET AL. *v.* BOARD OF ZONING APPEALS, CLEVELAND, ET AL.

APPEAL FROM THE SUPREME OF OHIO.

No. 136. Decided October 13, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.